IN THE

Supreme Court of the United States

October Term, 1944.

No. 148

WEBRE STEIB COMPANY, LTD., *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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LIST OF AUTHORITIES CITED.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Webre Steib Company, Ltd., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing consolidated cause (Docket Numbers 10641 and 10657). That Court's opinion was rendered on February 15, 1944, and the petition for rehearing was denied on March 13, 1944.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935 (U. S. C. A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Webre Steib Company, Ltd., herein for convenience called Webre, was a grower and processor of sugarcane, and during the period from June 8, 1934, through November 8, 1935, paid processing taxes totaling $8,169.97 under the Agricultural Adjustment Act of 1933 as amended. It filed claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United Statse Processing Tax Board of Review.

That Board, after a hearing, made findings of fact, among others, to the effect that Webre bore the burden of the processing tax paid by it to the extent of $3,655.82 (R. 30-36) and did not shift such burden in any manner whatsoever, and rendered a decision that Webre is due a refund of that amount (R. 36). Webre and the Commissioner each filed a motion for rehearing with the said Board; but, the said Board failed to act on such motions before it was abolished by statute on December 31, 1942. Thereafter, The Tax Court of the United States which had acquired jurisdiction by Section 510 of the Revenue Act of 1942 denied the said motions for rehearing (R. 47). From the decision of the Processing Tax Board both parties filed petitions for review in the Circuit Court of Appeals for the Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906(g).

In addition to those just mentioned, the Processing Tax Board of Review made fact findings—

(a) as to the factors influencing the price of raw and refined sugar during the period two years before the tax (Finding 6, R. 33-34);

(b) that the average margin per unit of the commodity processed was $.00162 lower in the tax period than it was during the base period (Finding 11, R. 35);

(c) that there was a universal increase in the sale price of sugar, on the effective date of the tax, in an amount slightly in excess of the tax (Finding 6, R. 34);

(d) that the broker who sold the sugar for Webre wrote a letter to Webre that it paid no more tax than it collected (Finding 12, R. 35-36); and

(e) that Webre was a grower of sugarcane and a purchaser of sugarcane which it processed during a period of less than three months between the dates of October 17th and January 3rd each year (Findings 1 and 2, R. 31).

The foregoing fact findings by the Board are the pertinent ones here. Important too, are facts that the Board failed to find, namely:

(a) that Webre did no processing during the period six months after the tax (Stipulation Par. 1 and 2, R. 66);

(b) that the quota system under the Agricultural Adjustment Act, as amended, was in full force and effect during the period June 8, 1934, to and beyond January 3, 1937 (Stipulation Par. 3, R. 66); and

(c) that a margin computation based on the processing of the 1936 crop reveals that Webre bore the burden of a greater amount of tax, by $1,134.14, than it actually paid (Opinion R. 39; Stipulation, Par. 4, R. 66).

The Commissioner appealed to the Circuit Court of Appeals. That Court reversed the judgment of the Processing

Tax Board of Review on the ground that the universal price increase on the effective date of the tax and the broker's letter to Webre *dissolved* the presumption created by the margin computation (R. ~~[illegible]~~)77

Webre appealed to the Circuit Court of Appeals on the grounds that the margin and refund determined by the Board was a minimum sum; that the findings actually made with respect to the period two years before the tax rebutted the balance of the margin that was unfavorable to Webre; and that the 1936 crop was proper rebuttal evidence and revealed that Webre bore the full burden of the tax. The Circuit Court held that the findings with respect to the two years before the tax at best would make the statutory presumption inapplicable (R. 75 ~~[illegible]~~) instead of accounting for the balance, and that the 1936 crop experience could not be used as a comparison or rebuttal (R. 75).

Webre's contentions are that the Court erroneously held the statutory prima facie showing is completely dissolved and loses all probative effect upon the presentation of any evidence tending to rebut it; that the Court erred in failing to treat the 1936 crop experience as proper rebuttal; that the Court erred in failing to hold that the margin showing resulting from the two years before the tax was a minimum margin; that the Court erred in failing to hold that the variance in such factors was proper rebuttal of the unfavorable part of the margin, and that the Board's Findings require a decision that Webre bore the full burden of the tax. Hence from Webre's viewpoint these are the

QUESTIONS PRESENTED.

1. What meaning and effect did Congress, in Section 907 of the Revenue Act of 1936, intend to give to the "prima facie evidence" arising from the comparison of the average margins computed as therein authorized?

2. Was the evidence submitted by the Commissioner of Internal Revenue sufficient to rebut the prima facie show-

ing made by Webre under Section 907(a) of the Revenue Act of 1936?

3. If the term "prima facie evidence" is to be regarded as merely a rebuttable presumption in the strict sense and as being completely dissolved upon the presentation of any evidence tending to rebut it, then arises the issue as to whether or not, independent of the presumption, there was substantial evidence in the record supporting the finding of the Board that Webre bore the burden of the tax to the extent of $3,655.82?

4. There being substantial evidence to support the Board's finding that Webre bore the burden of the tax to the extent of $3,655.82, was the Circuit Court of Appeals authorized to review the evidence and substitute a contrary conclusion for that of the Board?

5. Is a margin computation based on the succeeding crop (1936) under conditions where all factors, except the tax, are alike, proper rebuttal of the balance of a margin computation found to contain factors that are not alike?

REASONS FOR GRANTING THE WRIT.

1.

In construing Section 907 of the Revenue Act of 1936, the Circuit Court of Appeals followed its analysis of the presumption in *Commissioner* v. *Bain Peanut Company* (134 F. (2) 853). This Court granted certiorari in *Bain Peanut Company of Texas* v. *Commissioner* (320 U. S. 721). However, this Court did not decide the question as the petition was dismissed on motion of the *Bain Peanut Company* on March 6, 1944. The question is more important now than it was when this Court granted certiorari in the *Bain* case (supra) as the said Circuit Court of Appeals continues to follow the *Bain* case at times and there is being filed simultaneously with this petition two other petitions, namely *Caldwell Sugars, Inc.* and *Slack Bros., Inc.*, from the same Circuit on the same question.

2.

The importance of the question is readily apparent from an examination of Title VII of which Section 907 is a part (see Appendix). This Title prescribes an exclusive method of obtaining refunds of processing taxes paid under the unconstitutional provisions of the Agricultural Adjustment Act of 1933; *Anniston Manufacturing Company* v. *Davis* (301 U. S. 337). Claims for refund were easily known to be so numerous and important that Congress in Section 906 felt impelled to establish a special agency, the Processing Tax Board of Review, to hear and pass upon refund claims exclusively. At the heart of every claim is the comparison of average margins for the tax period and the period before and after the tax; no claimant can get his claim considered without presenting this prescribed margin computation or without having the margin computation invoked against him. It is obviously important to all taxpayers having refund claims now to know whether the prima facie evidence or the presumption established by Subsection (a) of Section 907 is to disappear wholly and be completely dissolved when any substantial rebutting evidence is produced, or, as Subsection (e) would seem to indicate, must it be rebutted "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax?"

3.

Furthermore, in the present case the Fifth Circuit Court of Appeals has rendered a decision in conflict with other Circuit Court of Appeals on the same matter. We refer to the decision of the Circuit Court of Appeals for the Second Circuit in *Regensburg* v. *Helvering* (130 Fed. (2d) 507). In that case the margin for the tax period was greater than for the period before and after the tax; that is, it was unfavorable to the taxpayer. That Court said:

"The caption of # 907 is 'Evidence and presumptions,' and #907 (e) speaks of the 'prima facie evi-

dence' as a 'presumption.' This might mean that, as soon as the claimant had put in any evidence, the office of the presumption was over; or it might mean that the claimant had the burden of proof. That question was reserved in Epstein v. Helvering, 4 Cir., 120 F. (2d) 427, but we must decide it here. We think that 'presumption' cannot in this connection mean burden of proof because the claimant has that burden anyway; on the other hand the section can hardly mean merely to set up a presumption, because no presumption is necessary against one who has the burden of proof. True, a claimant would be helped by a presumption when the 'margin' for the 'tax period' is less than that for the 'base period', but if no more than that was meant, it is difficult to see why it should have been necessary to speak of any 'presumption' when the spread between 'margins' was against him. For these reasons we think that the section could not have used presumption in the strict sense, but that it meant that when the spread between 'margins' is against the claimant, even though he may in general have otherwise satisfied the conditions of #902, 7 U. S. C. A. #644, he must show that the spread was not owing to his shifting the tax."

The Second Circuit Court therein says that the statute does not use "presumption" in the *strict sense;* whereas in the present case, the Court for the Fifth Circuit says in effect that it was used in the strict sense. In the *Regensburg* case the Court says that even though the taxpayer may in general have otherwise satisfied the conditions of Section 902,—that is, by showing that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly through various means there enumerated "or in any other manner whatsoever",—he must still go further, if the margin is against him, and "show that the spread was not owing to his shifting the tax". In other words, in the *Regensburg* case the Court held that even though the taxpayer has otherwise shown that he has not shifted the tax, he must still overcome the margin by evidence. Thus the

Court for the Second Circuit did not treat the margin as a presumption dissolved by offering some rebuttal, but as a piece of evidence to be overcome by evidence of greater weight.

We also refer to *Helvering* v. *Insular Sugar Refining Corp.* (not yet reported, but appearing in Commerce Clearing House 1944 Federal Tax Service, paragraph 9260) decided by the United States Court of Appeals for the District of Columbia on March 27, 1944. That was a sugar processing case. There, as here, the Processing Tax Board determined a margin partly favorable to the taxpayer; there, as here, there was a price increase on the effective date of the tax; there, as here, the taxpayer did no processing for months after the imposition of the tax. A divided Court affirmed the Board; but, even the dissenting opinion holds that the margin computation retains probative value. Edgerton, J., states:

> "Both because of the provisions of section 907(e) and independently of section 907(e), therefore, in my opinion the evidence eliminated the presumption, as such, from the case. The difference in margins was not eliminated from the case, but it was only evidence, entitled to no artificial weight."

4.

The Circuit Court of Appeals in this case (and *Caldwell* and *Slack* filed this day) conflicts with the FOURTH CIRCUIT as to the relevancy of other evidence advanced by the taxpayer upon a showing that the statutory margin periods are not comparable.

In *Epstein* v. *Helvering*, (120 F. (2d) 427) the Fourth Circuit Court of Appeals excluded the post-tax period from a margin computation because conditions had changed, stating at page 430:

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such

a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

The same Court in *Arkwright Mills* v. *Commissioner*, (127 F. (2d) 465), held that a period after the tax that included the statutory post-tax period was proper rebuttal of the statutory margin. It stated at pages 467-8:

> "We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the evidence represents merely an attempt to show what the taxpayer's margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. * * * Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress 2nd Session, on H. R. 12, 395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, American Economic Review, March, 1937, p. 52."

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BRIEF IN SUPPORT OF PETITION.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as being wholly dissolved and of no probative force when any substantial rebutting evidence is introduced.

2. In holding that the Commissioner of Internal Revenue could rebut the prima facie evidence arising from the margin computation in any manner other than "by proof of the actual extent to which the claimant (Webre) shifted to others the burden of the processing tax," as required by Subsection (e) of Section 907.

3. In overthrowing the Board's finding of fact, supported by substantial evidence, that Webre bore the burden of the tax to the extent of $3,655.82.

4. In failing to hold that the 1936 crop experience rebutted the balance of the margin and, therefore, that Webre bore the entire burden of the tax.

ARGUMENT.

Effect of the Presumption.

As clearly appears, the Court in following *Commissioner v. Bain*, (134 F. (2d) 853) based its construction of the prima facie evidence portions of Section 907 upon *Mobile, J. & K. C. RR. Co. v. Turnipseed*, 219 U. S. 35, and *Western & Atlantic Railroad Co. v. Henderson*, 279 U. S. 639, and said that any different construction would, as between private parties, violate the due process clause of the 14th Amendment or the same clause of the Fifth Amendment. The Court concedes, however, that there is no question of due process in this case, but "merely a question as to the weight and character of the presumption that Congress intended to create."

Congress itself indicated the weight and nature of the presumption in Subdivision (e) of Section 907, reading in part:

> "Either the claimant or the Commissioner may *rebut* the presumption established by Subsection (a) of this Section by proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax." (Italics supplied.)

The nature of the proof necessary to rebut the presumption is clearly prescribed; and this definitely negatives the idea that Congress intended the presumption to be dissolved upon the production merely of any substantial rebuttal.

Statutory presumptions, fundamentally, fall into one of three groups:

(1) An inference or assumption which must be drawn by the trier of facts from a given fact or set of facts with an operative effect only upon the burden of going forward

with the production of evidence; when any rebutting evidence is produced the presumption is dissolved (the Court held the presumption here to be of this type).

(2) An inference which must be drawn but which places upon the opponent the burden of persuading the trier that the presumed fact does not exist; i.e., the presumption shifts the burden of persuasion, i.e., of proof; and

(3) An inference which must be drawn and must be used by the trier with the evidence; it may have an effect upon the burden of producing evidence, but the satisfaction of the burden does not totally destroy the presumption, for its effect as evidence remains.

It is submitted that the language used by Congress in subdivision (e) indicates that it intended the presumption to have the effect of either (2) or (3). In the case of *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, 354, this Court did not construe Section 907 as did the Circuit Court of Appeals in the present case. The Supreme Court said (page 354):

> "But it cannot be said that the comparison set up between the results of operations during the 'tax period' and the 'period before or after the tax' are wholly irrelevant."

And again, (page 355) this Court said:

> "The permissible, and we think the true, construction of Section 907 (e) is that the words '*actual* extent' are used in contradistinction to the *presumed* extent, accorded to the prima facie presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged under Section 907 (a) or otherwise."

Observe that the Court speaks of proof in *rebuttal* and evidence to *overcome* the presumption, not merely dissolving it by the production of some evidence.

It is suggested that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; the real distinction being that in the former there was "some rational connection between the fact proved and the ultimate fact presumed"; whereas, in the latter case this reasonable connection was absent, the Court saying:

> "The mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway company or of both or without fault of anyone."

There is no constitutional inhibition against a presumption such as (2) and (3) above which may shift to the opponent the burden of persuasion or which remains in the case as evidence even after some rebutting evidence is produced. The real ground upon which the state statutory presumption was held invalid in the *Henderson* case was because it was unreasonable and arbitrary and denied the railway company a fair opportunity to repel it. This Court has already held in the *Anniston Manufacturing Company* case that the presumption here is not unreasonable or arbitrary.

In the case of *Heiner v. Donnan*, 285 U. S. 312, 329, this Court recognizes that a rebuttable presumption may have the effect of shifting the burden of proof.

It has been repeatedly held that statutory presumptions, admittedly constitutional, do affect the burden of proof and are to be considered as evidence. As an illustration, the Internal Revenue Act now in effect and those for several years back contain a provision with respect to estate taxes that any transfer of a material part of his property made by a decedent within two years prior to his death without

consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This provision shifts to the taxpayer the burden of overcoming this presumption by satisfactory proof; and no Court has held that the presumption is unconstitutional or that it is dissolved merely upon the introduction of some proof of a rebuttable nature.

Shwab v. *Doyle*, 269 Fed. 321 (C. C. A. Sixth) (reversed on another point 258 U. S. 529), dealing with this statute, says (page 333):

> "The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. * * * Unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion."

Other cases to a similar effect are *Myers* v. *U. S.*, 2 Fed. Supp. 1000, 1006 (Court of Claims), Writ refused 292 U. S. 629; *Myers* v. *McGruder*, 15 Fed. Supp. 488, 496; *Land Title & Trust Company* v. *McCaughn*, 7 Fed. Supp. 742, 744.

In *James-Dickinson Farm Mortgage Company* v. *Harry*, 273 U. S. 119, the Court says (page 124):

> "It is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them, and also that it may change the burden of proof."

Hawes v. *Georgia*, 258 U. S. 431, involved the prohibition laws of Georgia which provided that when any distilling apparatus is found upon the premises same shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof. In a prosecution under this statute the burden of proof of course was on the

state to show the defendant's guilt, but it was held that when proof of possession was furnished the burden then shifted to the defendant to show his lack of knowledge. The Court said:

> "The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of the due process of law."

The Court below observed in the *Bain* case (supra) that "the law governing the burden of proof is a matter of substance," citing *Central Vermont Railway Co.* v. *White*, 238 U. S. 507.

Granting that the law governing burden of proof is a matter of substance, we submit that to construe the presumption here as one shifting the burden of proof would not result in changing the substantive law. The substantive law during the course of the hearing and at its end is the same as it was when the hearing began; the rule with respect to the statutory presumption was in effect before the hearing and remained the same throughout the hearing. In the case of *Central Vermont Ry. Co.* v. *White*, the Court was dealing with the question as to whether or not, in the particular case for personal injuries brought under a Federal statute but in a State court, the plaintiff had the burden of proving a lack of contributory negligence as required by the state rule or whether the burden was on the defendant to plead and prove the existence thereof as required by the practice in the Federal courts. The Court merely held that the rule with respect to the burden of proof was a matter of substance and not a matter of procedure, and therefore it would be assumed that Congress intended that the Federal rather than the State rule should prevail in all suits brought under the Federal Act.

Cited above is *Hawes* v. *Georgia*, wherein a statute was upheld which raised a presumption of guilty knowledge

from proof of possession, and shifted to the defendant the burden of disproving such knowledge. Similarly, in *Yee Hem v. U. S.*, 268 U. S. 178, there was involved a prosecution for the offense of concealing smoking opium after importation with knowledge that it had been imported in violation of the Federal Act, the law providing, among other things, that "possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." The burden of course was on the prosecution to prove the guilt of the defendant beyond a reasonable doubt; but, possession having been proved, the burden shifted to the defendant to avoid conviction by producing satisfactory explanation of such possession. Although this presumption resulted in the shifting of the burden of proof, it was upheld, the Court saying (page 184):

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overdone, not only by direct proof, but in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not arising under the statute."

That the burden of persuasion (i. e. of proof) may shift during trial as the result of a presumption is further illustrated in criminal prosecutions where defendant interposes a plea of insanity. The burden of proof is on the defendant to show that he was insane at the time of the criminal act. But this burden shifts if proof is made that at a prior date he had been adjudged insane; the presumption that such insane condition continued to exist after the date of its judicial determination then places on the prosecution the burden of proving that at the time of the commission of the offense the accused was sane. (*Witty v. State*, 171 S. W. 229).

To say that a particular presumption has the effect only of requiring the adversary to produce some proof in rebuttal and then disappears would, in the case of trials in the District Courts, have the effect of transferring jury functions to judges, as Mr. Justice Black points out in his dissenting opinion in *New York Life Insurance Company* v. *Gamer* (303 U. S. 161, 172), in that thereby the trial judge would be given the right to weigh the rebutting evidence and "decide when sufficient evidence has been introduced to take from the jury" the right to find in favor of the presumed fact even though the jury might disbelieve the rebutting evidence or give less weight thereto than does the trial judge.

Hence we urge that the Court below misconstrued the terms "prima facie evidence" and "presumption" as used in Section 907; that the presumption was not dissolved but remained as evidence to be rebutted or overcome only by proof by the Commissioner "of the actual extent to which the claimant shifted to others the burden of the processing tax."

The Court Improperly Set Aside a Fact Finding of the Board and Substituted Its Own Finding Therefor.

The 14th Finding of Fact of the Processing Tax Board of Review (R. 36) was that Webre bore the burden of the processing tax paid by it to the extent of $3,655.82 and did not shift such burden in any manner whatsoever.

The Court below considered that the decision of the Board was favorable to Webre on the basis of the presumption alone (R. 7[illegible]); and in effect that, with the presumption gone, the finding of the Board stood unsupported by the evidence. In this the Court was in error.

Assuming the presumption to be dissolved, it is fundamental that *the facts upon which the presumption is based remain as a foundation for any inference which the trier of the facts might justifiably draw.* The difference is

simply this: With the presumption in, the Board, as the trier of the facts, must draw the prescribed inference from the proved facts; with the presumption out, the Board could but is not compelled to draw the same inference.

Therefore, the fact that Webre's margin of profit during the tax period was $.00162 per unit less than during the period before and after the tax was a fact still in the case; and, as already indicated, the Supreme Court in the *Anniston Manufacturing Company* case says that the comparison between the result of operation during the tax period and the period before and after the tax are not irrelevant. These facts are still in the case, and it is for the trier of the facts,—that is the Board, and not the Court,—to determine how much weight should be given thereto.

The Court Below Improperly Held that the 1936 Crop Experience Was Not to Be Considered Relevant.

The statatory margin computation in the case at bar for the period before and after the tax is actually confined to the period before the tax as, the petitioner did no processing during the period six months after the tax—neither did any other maker of sulphitated sugar as such business is purely seasonal and confined to the period October to January, the grinding season. Furthermore, the period before the tax is not a period in which all factors excepting the tax are the same as during the tax period. The quota system and its admitted effect on prices is but one outstanding difference.

Not only is the 1936 crop—the entire processing that took place between the period February 1936 to August 31, 1937 —comparable in every respect to the tax period for the reason that the quota system was continued throughout that entire period, and, therefore, is a proper rebuttal of the margin comparison with the period before the tax; but it is also proper to substitute such period for the period before the tax.

The 4th C. C. A. has had the question of other periods than the statutory periods before it in two cases and in each case decided in favor of the taxpayer. In *Morris M. Epstein v. Guy T. Helvering*, 120 Fed. (2d) 427, decided June 10, 1941, the Court excluded from the margin computation the period after the tax and allowed a refund based on the period before the tax. The Court said at page 430:

> "It is manifest from these figures that a comparison of the statutory margin does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant. * * *"

And in *Arkwright Mills v. Commissioner*, 127 Fed. (2d) 465, decided December 18, 1941, the Court permitted the use of a period thirty months after the tax for comparison purposes. The Processing Tax Board had rejected this testimony and the Court said:

> "* * * The evidence was rejected simply on the ground that in the judgment of the Board it was not the type of proof required by the statute to rebut the statutory presumption. In this action there was error. The statute permits the use of any evidence which is pertinent to the questions to be determined. The evidence offered was pertinent and possessed of probative force, and would have justified a finding in the claimant's favor."

In the case at bar, the effect of the quota system, the removal of overhanging supplies, the exhaustion of quotas resulting in the elimination of year end supplies are all factors that distinguish the period before the tax from the tax period; whereas during the 1936 crop as in the tax period the quota was effective.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Sec. 902. CONDITIONS ON ALLOWANCE OF REFUND.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review, in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C. 1940 ed., Title 7, Sec. 644.)

Sec. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricul-

tural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (U. S. C. 1940 ed., Title 7, Sec. 645.)

Sec. 906. PROCEDURE ON CLAIMS FOR REFUND OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallawance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. * * *

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(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner, or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926 as amended. (U. S. C. 1940 ed., Title 7, Sec. 648.)

Sec. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of

the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each

article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(c) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe

that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima facie evidence that such amount was not borne by the claimant but that it was shifted to others. (U. S. C. 1940 ed., Title 7, Sec. 649.)